TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [illegible] 189

THE UNITED STATES, APPELLANTS,

vs.

J. SMITH SPEED AND DAVID H. DAVIS.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 7, 1887.

SUPREME COURT OF THE UNITED STATES.

No. 342.

THE UNITED STATES, APPELLANTS,

vs.

J. SMITH SPEED AND DAVID H. DAVIS.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition.*

J. SMITH SPEED, DAVID H. DAVIES,
vs.
THE UNITED STATES. } U. S. Court of Claims.

To the Honorable Court of Claims:

The petition of J. Smith Speed and David H. Davies, citizens of the United States, resident in the city of Louisville, State of Kentucky, sheweth unto the court, that on the twenty-fifth day of October, in the year of our Lord one thousand eight hundred and sixty-four, Major H. C. Symonds, of the Commissary Department of the United States Army, then on duty as a Commissary of Subsistence in the United States Army for the military district of Kentucky, acting under the authority vested in him as such commissary of subsistence, for and on behalf of the United States, entered into a contract with petitioners—which contract was in writing, and is as follows:

Articles of agreement entered into this 25th day of October, eighteen hundred and sixty-four, between Major Henry C. Symonds, Commissary of Subsistence, an officer in the service of the United States of America, of the one part, and J. Smith Speed and David H. Davies, both of Louisville, county of Jefferson, and State of Kentucky, of the other part.

This agreement witnesseth, that the said Major Henry C. Symonds, Commissary of Subsistence, for and on behalf the United States of America, and the said J. Smith Speed and David H. Davies, for themselves, their heirs, executors and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, viz:

First. That the said J. Smith Speed and David H. Davies shall slaughter, dress, cut, pack and cure into pork or bacon, fifty thousand (50,000) hogs, as follows or otherwise, as the commissary of subsistence shall direct, viz.:

2d. The hogs to be taken at the pens, sent to the slaughter-house, killed, dressed and hung up to cool; then to be cut, if practicable, as follows:

3d. The body into four (4) pieces, and packed, salted and brined in barrels, which are to be well coopered, ready for delivery. The hams and shoulders to be closely trimmed, bulked in salt in the manner best adapted to curing, then turned, handled and cured and smoked and packed in tierces ready for delivery; the head, leaf, fat, and trimmings, and all lard-yielding parts rendered into best possible quality of lard, run into packages, to be well coopered, ready for delivery.

4th. The dead hogs' guts, offal and all grease yielding parts to be rendered into grease, and into packages, to be well coopered ready for delivery.

Second. That for the purpose of carrying out this agreement, the said J. Smith Speed and David H. Davies shall provide themselves with such buildings, pens, tools, water, and labor of every description, as shall be necessary to perform the work in the most thorough and business-like manner, and they shall receive therefor from the United States, in currency or its equivalent, the sum of ninety-two and one-half cents (92½c.) per 100 pounds net of hog meat, the weight to be determined by weighing the hogs when cooled ready for cutting at the block.

Third. Payment shall be made at the rate of fifty (50) cents per 100 pounds for each and every thousand (1,000) hogs packed or bulked (as the case may be) until the whole number of hogs presented be cured, when twenty-five (25) cents per 100 pounds additional shall be paid; and the final and complete payment shall be made when all the products are delivered, or ready for delivery, to the United States.

Fourth. Not more than two (2) of the known pork-houses of the city shall be used by the party of the second part for the purposes of this contract, and the United States shall be responsible for any losses or injury to the meat arising from causes external to the pork-house and grounds pertaining thereto; but the said J. Smith Speed and David H. Davies shall use due care and diligence to protect the U. S. against any loss arising from causes within the area of the property used for the purposes of this contract.

3 Fifth. That the United States shall furnish suitable guards to be stationed around and outside said area or areas, for the purpose of external security, and the party of the second part shall provide such watch or guard as necessary for internal security.

Sixth. The whole process from beginning to end shall be subject to such inspection and control as the commissary of subsistence shall from time to time demand for the interest of the government.

Seventh. No member of Congress, officer, or agent of the government, or any person employed in the public service, shall be admitted to any share herein, or to any benefit which may arise herefrom.

Eighth. This contract to be subject to the approval of the Commissary General of Subsistence.

In witness whereof, the undersigned have hereunto placed their hands and seals the day and date first above written.

H. C. SYMONDS,
Major and C. S.
J. SMITH SPEED.
D. H. DAVIES.

Witnesses:
SAM'L F. BISHOP.
GEORGE A. RUST.

[Five cent stamp.]

It is understood that, as a proviso of this contract, I am to furnish all the hogs at the pork-house pens, also all the cooperage, salt, &c., at the pork-house yard.

H. C. SYMONDS,
Major and C. S.

That no further or additional directions were given your petitioners under the first clause in said contract, at any time. That no member of Congress, or other person in the employment of the government, was ever admitted to any share or benefit in said contract.

That said contract was duly approved by the Commissary General of Subsistence of the United States Army.

And your petitioners further show that immediately upon the execution of said contract, they gave a bond in the penalty of seventy-five thousand dollars, with good and sufficient sureties, conditioned for the faithful performance by them of the said contract, which was duly approved and accepted by the said commissary of subsistence;

4 and that in pursuance of the said contract they immediately contracted for the use of a commodious building with pens attached thereto, erected for the purpose of slaughtering hogs, situated in said city of Louisville, and well known as among the pork houses in said city; and further provided themselves with all the tools, labor, skill, water and apparatus, and all else that was necessary on their part under their contract to faithfully comply with its terms; and on or about the tenth of November, A. D. 1864, wre ready to receive the hogs and to proceed with their slaughter, &c. That the said commissary of subsistence, acting on behalf of the United States, in pursuance of the said contract, soon thereafter furnished your petitioners with the corn, fuel, salt, cooperage, &c., necessary for the slaughtering and packing the said fifty thousand hogs, and from time to time, up to and until about the twenty-fifth of December, A. D. 1864, delivered to your petitioners seventeen thousand one hundred and thirty-two (17,132) hogs; all of which they slaughtered, cut, packed, bulked, cured, and rendered into lard and grease, in accordance with the terms of the said contract, and for which they have been fully paid by the United States. That the average weight of the said seventeen thousand one hundred and thirty-two (17,132) hogs, after they had dried and cooled and were ready for cutting at the block, was two hundred and six pounds nett weight.

And your petitioners show that they have at all times and in all respects complied with all of the stipulations in said contract on their behalf, except as is hereinafter stated, and have been ready and willing to perform all the service required of them by said contract. That expecting and relying upon the fulfillment of the stipulations in said contract on the part of the government, they provided at a great expense and outlay, sufficient buildings, pens, tools, water, skill and labor for slaughtering the whole number of fifty thousand hogs, and at a great expense kept the same in readiness to perform the said service for the United States, so long as there was any reasonable prospect that the United States would comply with its stipulations by furnishing the said fifty thousand hogs to be slaughtered, &c., to wit, until the first day of January, A. D. 1865.

And your petitioners show that if the United States had

5 furnished the fifty thousand hogs to your petitioners, within a reasonable time, according to the terms of said contract, the additional expense to your petitioners, for slaughtering, cutting, pack-

ing, bulking, curing, and rendering them into lard and grease, &c., according to the terms of said contract, over and above the expenses which they had already incurred in that behalf, would not have exceeeded the sum of thirty-seven thousand seven hundred and ninety-eight dollars and twenty cents, ($37,798 20.)

But your petitioners show that the remainder of said hogs, that is to say, the number of thirty-two thousand eight hundred and sixty-eight hogs called for by said contract, were never furnished to your petitioners by the said commissary of subsistence, nor by any other officer or person for or on behalf of the United States, at any time.

But the United States and its officers have wholly failed and refused to deliver the said thirty-two thousand eight hundred and sixty-eight hogs, or any part thereof to your petitioners, in violation of the said contract.

Although the said commissary of subsistence, who represented the United States in this matter, was frequently requested so to do by your petitioners, to wit, between the tenth day of November, 1864, and the 25th day of December, A. D. 1864.

That by reason of such failure on the part of the United States to deliver to your petitioners the said 32,868 hogs, according to the terms of the said contract, your petitioners were compelled to incur great outlay and expenditures in paying for the use of the buildings, tools, machinery, fixtures, labor, and skill which were thus kept idle and unemployed, amounting to the sum of $24,832 77.

That the average weight of the hogs which are fit and suitable for the purposes of the United States government, and were intended by both of the parties to said contract, is two hundred and six pounds, and the sum which your petitioners would have been entitled to receive from the United States, if the said number of thirty-two thousand eight hundred and sixty-eight hogs had been delivered to your petitioners and slaughtered, cured, &c., according to the terms of said contract, would have been sixty-two thousand six hundred and thirty dollars and ninety-seven cents, ($62,630 97.) While the additional outlay which your petitioners would have been compelled to incur in completing the service required of them by the contract, would have been thirty-seven thousand seven hundred and ninety-eight dollars and twenty cents as aforesaid, leaving the balance, which your petitioners would have received from the United States, over and above what they would have been compelled to further expend, of the sum of twenty-four thousand eight hundred and thirty-two $\frac{77}{100}$ dollars, ($24,832 77.)

Your petitioners further show that they were absolutely prevented from performing the service required of them by the said contract, as to the said thirty-two thousand eight hundred and sixty-eight hogs, solely and entirely by the default and failure of the United States and not by their own default and negligence in any degree.

Wherefore, they say there is due them from the United States the sum of twenty-four thousand eight hundred and thirty two and 77-100 dollars, ($24,832 77,) as damages accruing to them for the said breach of contract. And your petitioners further show that they have made

application to the Commissary General of the United States, for the payment of their said claim, which has been refused by the said Commissary General, who alleges as his reason therefor, that the said contract did not require the United States to deliver to your petitioners any particular number of hogs; that there has been no further action in said case by any of the departments of the government or by Congress.

That no person is owner of or interested in said claim except themselves. That each of your petitioners has at all times borne true allegiance to the government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

They therefore pray that a judgment may be awarded them against the United States for the said sum of twenty-four thousand eight hundred and thirty-two 77-100 dollars, ($24,832 77.)

J. SMITH SPEED.
DAVID H. DAVIES.

J. Smith Speed and David H. Davies, the claimants in the foregoing petition, being duly sworn, depose and say, that no assignment or transfer of said claim, or any part thereof, has ever been made; that they are justly entitled to the amount claimed therein from the United States, after allowing all just credits and offsetts; that they have read said petition, and know the contents thereof, and that they believe the facts as stated in said petition are true.

J. SMITH SPEED.
DAVID H. DAVIES.

UNITED STATES OF AMERICA, *District of Kentucky:*

I, A. J. Ballard, Clerk of the District Court of the United States for said District, certify that on this day, before me in my said office, J. Smith Speed and David H. Davies, whose names appear within, and who are personally known to me, subscribed and swore to the within affidavit.

Witness my signature and the seal of said court, this 21 November, A. D. 1865.

[L. S.] A. J. BALLARD, *Clerk.*

[Five-cent stamp.]

P. O. address of claimants is J. Smith Speed and David H. Davies, Louisville, Ky.

Address of claimants' solicitors—

HUGHES, DENVER & PECK,
218 F St., Washington, D. C.

6 In the United States Court of Claims.

October term, A. D. 1865.

THE UNITED STATES
ats.
J. SMITH SPEED AND DAVID H. DAVIES. } No.

And the said defendants, by John J. Weed, their Solicitor, come and make answer to the petition of the claimant on file herein; and not confessing the same, or any part thereof, doth hereby most expressly deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of said petition as sets forth and avers that the United States is indebted to said claimant in the sum of twenty-four thousand eight hundred and thirty-two dollars and seventy-seven cents, the defendants say that they are not indebted to said claimant in said sum of money, nor any part thereof.

JOHN J. WEED,
Assistant Solicitor for the United States.

7 In the Court of Claims.

J. SMITH SPEED AND DAVID H. DAVIES
vs.
THE UNITED STATES. } No. 2,188.

And now, to wit, 2nd of April, A. D. 1867, the court, upon due consideration of the premises, find in favor of the claimants, and do order, adjudge, and decree, that the said J. Smith Speed and Daniel H. Davies have and recover of and from the United States the sum of nineteen thousand seven hundred and twenty dollars and eighty cents, ($19,720 80.)

BY THE COURT.

8 Court of Claims.

J. SMITH SPEED AND DAVID H. DAVIES
vs.
THE UNITED STATES. } No. 2,188.

The United States, by E. P. Norton, its Solicitor, hereby makes application to the honorable Court of Claims for an appeal of the case of J. Smith Speed and David H. Davies *vs.* The United States, to the Supreme Court of the United States.

(Signed) E P. NORTON,
Solicitor for the United States.

Filed in the clerk's office June 10th, 1867.

9 At a Court of Claims held at the Capitol, in the city of Washington, on Wednesday, the 26th day of June, A. D, 1867,

J. SMITH SPEED AND DAVID H. DAVIES
vs.
THE UNITED STATES. } No. 2,188.

Mr. Norton, the Solicitor, submitted a petition for an appeal in this case from the judgment entered therein on the 2d of April last, to the Supreme Court of the United States: Whereupon, it was

Ordered, that the said petition be allowed.

10 In the Court of Claims.

Finding of the facts in the case, and the conclusions of law on said facts, on which the court founds its judgment:

J. SMITH SPEED AND DAVID H. DAVIES
vs.
THE UNITED STATES. } No. 1,865.

The court found the following facts:

1st. That the Secretary of War, through the Commissiary General of Subsistence, in the month of October, 1864, and during the pendency of the war, authorized Major Henry C. Symonds, an Assistant Commissary of Subsistence at Louisville, Kentucky, to purchase hogs, and enter into contracts for slaughtering and packing them to furnish pork for the army. Major Symonds entered in the following contract with the claimants:

"Articles of agreement entered into this 25th day of October, eighteen hundred and sixty-four, between Major Henry C. Symonds, Commissary of Subsistence, an officer in the service of the United States of America, of the one part, and J. Smith Speed and David H. Davies, both of Louisville, county of Jefferson, and State of Kentucky, of the other part:

"This agreement witnesseth, that the said Major Henry C. Symonds, Commissary of Subsistence, for and on behalf of the United States of America, and the said J. Smith Speed and David H. Davies, for themselves, their heirs, executors, and administrators, have mutually agreed, and by these presents do mutually covenant and agree to and with each other, as follows, viz:

"First. That the said J. Smith Speed and David H. Davies shall slaughter, dress, cut, pack, and cure into pork or bacon, fifty thousand (50,000) hogs, as follows or otherwise, as the commissary of subsistence shall direct, viz:

"2d. The hogs to be taken at the pens, sent to the slaughter-house, killed, dressed, and hung up to cool; then to be cut if practicable, as follows:

"3d. The body into four (4) pound pieces, packed, salted, and

brined in barrels, which are to be well coopered, ready for delivery. The hams and shoulders to be closely trimmed, bulked in salt in the manner best adapted to curing, then turned, handled, and cured and smoked and packed in tierces ready for delivery, the head, leaf, fat, and trimmings, and all lard yielding parts rendered into best possible quality of lard, run into packages to be well coopered ready for delivery.

"4th. The dead hogs' guts, offal, and all grease yielding parts to be rendered into grease, run into packages, to be well coopered ready for delivery.

"Second. That for the purpose of carrying out this agreement, the said J. Smith Speed and David H. Davies shall provide themselves with such buildings, pens, tools, water, and labor of every description, as shall be necessary to perform the work in the most thorough and business-like manner, and they shall receive therefor from the United States, in currency or its equivalent, the sum of ninety-two and one half cents (92 ½ c.) per 100 pounds nett of hog meat, the weight to be determined by weighing the hogs when cooled ready for cutting at the block.

"Third. Payment shall be made at the rate of fifty (50) cents per 100 pounds for each and every thousand (1,000) hogs packed or bulked, (as the case may be,) until the whole number of hogs presented be cured, when twenty-five (25) cents per 100 pounds additional shall be paid, and the final and complete payment shall be made when all the products are delivered and ready for delivery to the United States.

"Fourth. Not more than two (2) of the known pork-houses of the city shall be used by the party of the second part for the purposes of this contract, and the United States shall be responsible for any losses or injury to the meat arising from causes external to the pork house and grounds pertaining thereto, but the said J. Smith Speed and David H. Davies shall use due care and diligence to protect the U. S. against any loss arising from causes within the area of the property used for the purposes of this contract.

11 "Fifth. The United States shall furnish suitable guards to be stationed around and outside said area or areas for the purpose of external security, and the party of the second part shall provide such watch or guard as necessary for internal security.

"Sixth. The whole process from beginning to end shall be subject to such inspection and control as the commissary of subsistence shall from time to time demand for the interest of the government.

"Seventh. No member of Congress, officer, or agent of thegovernment, or any person employed in the public service, shall be admitted to any share herein, or to any benefit which may arise herefrom.

"Eighth. This contract to be subject to the approval of the Commissary General of Subsistence.

"In witness whereof, the undersigned have hereunto placed their hands and seals, the day and date first above written.

"H. C. SYMONDS,
"*Major and C. S.*
"J. SMITH SPEED.
"D. H. DAVIES.

"Witnesses:
"SAM'L F. BISHOP,
"GEORGE A. RUST.
[Five cent stamp]

"It is understood that, as a proviso of this contract, I am to furnish all the hogs at the pork-house pens; also, all the cooperage, salt, &c., at the pork-house yard.

"H. C. SYMONDS,
"*Major and C. S.*"

No advertisement for bids or proposals was put out before making the contract, as required by act March 2nd, 1861—12 Stat., p. 220.

After the contract was made, Major Symonds wrote to the Commissary General, informing him substantially of its terms; but no copy of it, nor the contract itself, was presented to the Commissary General for formal approval.

12 The Commissary General therupon wrote to Major Symonds expressing his satisfaction at the progress made. and adds, "the whole subject of pork-packing at Louisville is placed subject to your direction under the advice of Col. Kilburne. It is a novel undertaking for the subsistence department, but I expect from your zeal and devotion to the subject to realize satisfactory results."

The claimants incurred large expenditures in the preparation for fulfilling their contract. They also during the whole season kept the full complement of hands necessary to have slaughtered the whole fifty thousand within the customary season.

During the season there were furnished to the claimants seventeen thousand one hundred and thirty-two hogs, (17,132.) But owing to the high price of hogs, Major Symonds, with the approval of the Commissary General, gave up the enterprise, and refused to furnish the remainder of the fifty thousand.

This suit is brought by the claimants to recover damages for the non-fulfilment of the contract by the United States, and the measure of damages claimed was the difference between what it would

13 have cost the claimants to do the work, and the amount they were to receive for it.

Upon these facts the court held—

1st. That the Secretary of War, through the Commissary General might authorize such a contract to be made without a resort to the advertisement and bids proposed.

2d. That the letter of the Commissary General was a vertual approval of the contract.

3d. That the contract was an engagement on the part of the United

States to furnish fifty thousand hogs to the claimants to slaughter and pack, at the stipulated price, and that their failure in part to perform the same entitled the plaintiffs to recover damages.

4th. That the true measure of damages was the difference between the cost of doing the work and what the claimant was to receive for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract.

14 In the Court of Claims.

J. SMITH SPEED & DAVID H. DAVIS
vs.
THE UNITED STATES. } No. 2,188.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and of the final judgment of the court thereon; of the application of the solicitor of the United States for the allowance of an appeal, as filed in the clerk's office on the 10th day of June, A. D. 1867, and presented to the court on the 26th day of June, 1867, and of the proceedings of the court allowing the same; of the finding of the facts in the case by the court and the conclusion of law on said facts on which the court founds its judgment.

In testimony whereof, I have hereunto set my name and affixed the seal of said court, at Washington, this 5th day of December, A. D. 1867.

[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.